6. BUILDING AND CONSTRUCTION LAW

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Pre-bid agreements

6.1 In preparing their bids, contractors usually enter into pre-bid agreements with selected subcontractors. While a pre-bid agreement is typically couched in skeletal form, the terms are intended to form the basis on which the eventual subcontract would be formulated in the event that the general contractor is awarded the main contract. In *C S Bored Pile System Pte Ltd v Evan Lim & Co Pte Ltd* [2006] 2 SLR 1, the executive director of the defendant main contractor affixed his signature on the plaintiff's quotation for piling work and added the words "Terms & Conditions to be discussed" just above the signature. The plaintiff's case was based on this alleged acceptance by the defendant of its quotation which, it argued, formed a binding and enforceable agreement. Choo Han Teck J held for the plaintiff. He considered that it was not unusual that in construction contracts, some terms and conditions might have to be worked out subsequent to the formation of the contract, but as long as the nature and structure of the general agreement was clear, such an agreement was enforceable at law. In that case, the learned judge noted that the parties had met to calculate the prices for piling items so that the defendant could use them in its tender for the construction project; and the only reason the plaintiff subcontractor was open and diligent in sitting through such a session must lead to the view that once the agreement had been agreed, the prices would form the contract between them (at [6]). He decided that, in the circumstances, the insertion of the words "Terms & Conditions to be discussed" was probably an act in excess of caution.

Force majeure: Shortage of raw materials

6.2 Most modern construction contracts frequently contain express provisions stipulating situations where a party may properly suspend the carrying out of its contractual obligations or terminate the subject contract. A ground which is frequently relied on for this purpose is *force majeure*.

6.3 In *Sato Kogyo (S) Pte Ltd v RDC Concrete Pte Ltd* [2006] SGHC 213, the High Court had to consider whether, under the terms of a contract for the supply of ready mixed concrete, the supplier was entitled to suspend the supply of the ready mixed concrete on the premise that there was a "shortage of raw materials" pursuant to a *force majeure* clause. The plaintiff in that case was the main contractor for the construction of one of the stations on the Circle Line of the Mass Rapid Transit subway system. The defendant entered into a contract with the plaintiff to supply ready mixed concrete for the project. Some months after the parties had executed the contract, the defendant suspended the supply of the ready mixed concrete. The defence relied, *inter alia*, on a clause in the contract which read:

> In the event of any circumstance constituting Force Majeure, which is defined as act of God, or due to any cause beyond the supplier's control, such as market raw material shortages, unforeseen plant breakdowns or labour disputes, the duty of the affected party to perform its obligations shall be suspended or limited until such circumstance ceases.

6.4 Lai Siu Chiu J held that, on the construction of the terms of the supply contract, the defendant supplier was entitled to withhold supply of ready mixed concrete on the basis of *force majeure*. The learned judge said (at [81]):

> Although it is arguable that the defendant undertook the risk of a fixed price contract and should bear the consequences, the *force majeure* clauses are clear; the parties intended for them to operate to cover shortage of the raw materials.

6.5 However, the learned judge also ruled that these clauses did not entitle the defendant supplier to withhold supply due to "unforeseen plant breakdown" because the plaintiff had relied on the defendant's representation that it had "two back-up plants and two friendly suppliers to accommodate the supply of concrete to the plaintiff".

Performance bonds

6.6 There are very few construction contracts which will not require the appointed contractor to furnish a performance bond to secure the performance of the underlying contract. The inevitable question which arises is whether a bond should be construed as a separate contract from the underlying building contract in respect of which it was issued. If it is indeed a separate contract, then it would follow that it can be exercised separately even if a claim made pursuant to the underlying contract would have been time barred.

6.7 In *Econ Piling Pte Ltd v Aviva General Insurance Pte Ltd* [2006] 4 SLR 501, the plaintiff piling contractors were employed by the Jurong Town Corporation ("JTC") to supply and install bored piles for a building project. A performance bond was issued by the defendant insurers in favour of JTC to secure the plaintiff's performance. The bond provided that in the event of default by the plaintiff, a sum representing loss and damage would be paid to JTC. This sum was subject to a stipulated maximum and was to be certified by JTC's superintending officer. Following the plaintiff's completion of the piling work on 25 November 1992, JTC's building contractor proceeded with the building works. During the building works, defects and serious damage were discovered on the installed piles. JTC terminated the building contract and proceeded in arbitration against the building contractor. The plaintiff was not a party to the arbitration. On 31 March 2003, the arbitrator decided that liability for the defective piles attached not to the building contractor but to the plaintiff and JTC was ordered to pay the building contractor for the rectification of the damaged piles. JTC decided to retain the plaintiff's retention sum under the piling contract and at the same time made a call on the performance bond. In the High Court ([2006] 3 SLR 165), the learned judge noted that the subject performance bond did not have an expiry date and considered the bond to be a separate contract from the piling contract. He proceeded to hold that the expiry of the limitation period for claims under the piling contract did not, therefore, preclude JTC from making a call under the performance bond.

6.8 On appeal, the Court of Appeal pointed out that the purpose of the performance bond was to secure the performance of the underlying piling contract. As any claim under the piling contact was time-barred, the plaintiff was entitled to restrain JTC from calling on the bond in the same way it could have pleaded limitation as a defence had JTC sued on the piling contract. JTC's only recourse for its claim would be to the retention sum which it still held and for which a similar time bar precluded the plaintiff

from recovery. In the course of delivering the decision of the Court of Appeal, Lai Siu Chiu J further suggested that while, in this case, the subject bond was a default bond, the outcome would not have been any different had the bond been construed as a demand bond.

Piling sub-contracts

6.9 The case of *Resource Piling Pte Ltd v Geocon Piling & Engineering Pte Ltd* [2006] SGHC 134 highlights two interesting features of piling subcontracts. First, the court accepted evidence that piling subcontractors are usually paid according to the actual length of the pile installed because site conditions, such as the condition of the soil at the pile location, make it practically impossible to construct piles having the precise design length. A consequence of this is that it is normal for piles to be a few inches longer than the design length. In the instant case, this finding was further buttressed by the fact that the letter of award of the subject subcontract had provided that the "subcontract shall be administrated on a re-measurement basis according to the actual quantities of work done on site".

6.10 Second, piling contractors expect a high profit margin for their work because of the higher risks associated with working below the ground. The plaintiff had claimed for loss of profit and the High Court was prepared to accept a computation for this loss on the basis of a "historical profit" of 14%. As Tay Yong Kwang J explained (at [18]):

> Resource [the plaintiff] was ready and able to fulfil its side of the bargain but was forced to abandon the remaining works by Geocon's [the defendant's] intransigence. It was therefore entitled to make a claim for loss of profit. I accepted Resource's evidence that its average profit margin for its piling projects would be around 14% to 15% and computed the loss of profits at the lower of these two percentages.

Security of payments

6.11 The Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") was enacted on 16 November 2004 and came into effect on 1 April 2005. The objective of the Act is to address cash-flow disruptions in the construction industry by conferring a right to receive progress payment on any party who undertakes construction work, provides any service or supplies any goods or materials relating to construction work or the carrying out of construction work. This statutory right is protected by an adjudication machinery which was conceived to provide a temporarily binding determination of any payment dispute between parties to a contract

which falls within the ambit of the regime. The Singapore Mediation Centre ("SMC") was the first – and so far the only – authorised nominating body appointed by the Minister for National Development under the Act. Altogether, 20 adjudication applications were lodged with, and disposed of by, the SMC as at 31 December 2006.

6.12 The first adjudication application made under the Act was filed with the SMC in December 2005 and the year 2006 saw a steady stream of cases. An illustration of the operation of the adjudication process is afforded by the first adjudication application, *AA Pte Ltd v AB Pte Ltd* [2005] SOP AA01 which concerned a subcontract for the supply and installation of bored piles. In response to a progress payment claim submitted by the claimant subcontractor, the respondent main contractor wrote in a letter that it was unable to process the claim because certain documents had not been furnished by the claimant. The adjudicator ruled that this letter did not constitute a payment response in accordance with the Act and determined that the claimant was entitled to the full amount of the progress payment claim. In the second case, an adjudication application was ruled to have been made prematurely because the claimant failed to notify the respondent of its intention to apply for adjudication as required under s 13(2) of the Act: *AC Pte Ltd v AD Pte Ltd* [2006] SOP AA02. In *Company BZ v Company CA* [2006] SOP AA18, the matter involved two sub-contracts, one for bored piling works and another for the construction of a contiguous bored pile wall, both of which were subcontract works for the construction of a block of residential apartments. A separate payment claim for each contract was made by the claimant. In response to the payment claims, the respondent had counterclaimed for delay. However, the payment responses which contained the counterclaims were served out of time and failed to give any reasons for withholding the differences between the claimed amount and the response amount. In the result, the adjudicator determined that the claimant must succeed and allowed claims in respect of mobilisation, standby charges and work done.

6.13 During the year under review, the enforcement of one of the adjudication determinations came before the Subordinate Courts. In *Tuck Ah Electric & Engineering Pte Ltd v Team Corp Engineering Pte Ltd* Originating Summons No 6 of 2007, the determination itself was made on 11 September 2006. The successful claimant was awarded a sum of $83,624.23 with interest and the determination provided that the costs of the adjudication were to be borne by the respondent. The deputy registrar granted the claimant the enforcement order sought in respect of the adjudicated amount of $83,624.23 but decided that it should apply for a further order to enforce the

claim for interest and costs pending the clarification from the adjudicator on (a) the period during which interest was payable under the said determination and (b) the quantum of costs payable under the said determination. It is suggested that there is little difficulty with the learned deputy registrar's order that the adjudicator should clarify the period during which interest was to be computed. However, the part of the order which required the adjudicator to specify the quantum of costs payable was quite unexpected. Section 17(2)(*d*) of the Act requires the adjudicator to determine, *inter alia*, "the proportion of the costs of the adjudication payable by each party to the adjudication". Until the order of the Subordinate Court, it is generally assumed that this only requires the adjudicator to merely apportion the costs between the parties rather than stipulate the exact sum in the determination.

Contract documentation

6.14 A recurring feature with claims arising from subcontracts is the relative lack of documentary evidence supporting the existence of a contract. An instance of this was encountered in *Wah Heng Glass Holdings Pte Ltd v Diethelm Keller Engineering Pte Ltd* [2006] SGHC 29. In that case, the plaintiff was a designer and installer of external wall façades. Although the parties did not execute a formal contract, the defendant had placed with the plaintiff several orders for these façades in respect of 11 separate projects. The plaintiff claimed a total of $281,134.80 for work done and material supplied arising from the 11 projects undertaken for the defendant. The defendant pleaded that it had a defence of a set-off and counterclaim on account of defective work and material. The High Court ruled that there was a contract on the basis of (a) the evidence of the plaintiff's executive director; (b) purchase orders for the works; and (c) correspondence from the plaintiff to the defendant seeking payment. The court also considered that the conduct of the defendant and the evidence of its witnesses supported its finding that a contract existed.

6.15 The importance of ensuring that the contract is properly documented was also underscored in *Panwah Steel Pte Ltd v Koh Brothers Building and Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571. This was not a straightforward case because the plaintiff's line of argument changed from reliance on an implied term at the High Court level to an argument premised on a purposive interpretation of the express terms in a contract. The parties had entered into a contract under which the supplier agreed to supply the main contractor's steel requirements and the question was whether this obligation to supply was confined only to a particular

construction project. It was alleged that the main contractor, when calling on the supplier to fulfil its obligations to supply the steel, had its own stock of steel but had chosen to transfer this stock to its other projects elsewhere. On appeal to the Court of Appeal, the issue was whether the supplier had committed a breach of contract by failing to supply steel reinforcement bars to the main contractor in a situation where the latter did not require the same as it had transferred its own stock from its other sites to fulfil the requirement of the site designated to receive the goods from the supplier. Before the Court of Appeal, it was argued that on a proper construction of the terms, the supplier's obligation to supply the goods was limited to the designated construction site. This would depend on the construction of the terms of the contract between the parties as to whether the supply of goods contract was a "project-specific contract". The Court of Appeal accepted the supplier's argument "from a reading of all the relevant terms of the contract in an integrated fashion in the context it was made" (at [29]).

Repudiation and termination

6.16 The common law principles relating to the repudiation of a contract were re-visited in *HG Metal Manufacturing Ltd v Nam Tat Hardware Co* [2006] SGHC 37. The court in that case ruled that the party who asserted a right to terminate in the event of repudiation by the other party had to not only establish, firstly, that an act of repudiation was committed but also, secondly, that the repudiation was accepted. In this case, the issue of contention was whether the act of repudiation had been accepted by the innocent party. The court applied the test laid down in *Vitol SA v Norelf Ltd* [1996] AC 800, where Lord Steyn said (at 810) that:

> It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end.

Applying the test to the case, the learned judge held that the communication given by the innocent party fell short of clearly and unequivocally conveying to the repudiating party that the contract was at an end. In the case, the plaintiff also failed to discharge its burden to prove loss suffered from the breach on the basis of which repudiation was alleged and the plaintiff was accordingly awarded nominal damages fixed at $10.00.

6.17 When the industry is buoyant, situations may arise where a subcontractor or supplier deliberately demonstrates an intention to delay the works or the supply of goods in order to exact an increase in the price previously agreed for the works or goods. Although some sympathies may be

accorded to these subcontractors and suppliers who may in turn be pressurised by their own suppliers in these tight market conditions, the question arises as to whether such actions constitute repudiation under the contract.

6.18 In *Highness Electrical Engineering Pte Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 640, the plaintiff electrical subcontractor sued the defendant supplier for loss arising from an alleged breach of a contract to supply the plaintiff with electric cables for one of its projects. The learned judge in that case accepted the principle to be that as stated by Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 at 380: "To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract." The innocent party is considered to have been deprived "of a substantial part of the benefit to which he is entitled under the contract" if the consequences of the breach are such that "it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages as and when a breach or breaches may occur" (at 380). In the case before him, the judge considered that where goods were to be delivered over a period of time, one had to consider not only quantitatively the ratio of the cost of breach to the contract as a whole but also the degree of probability that such a breach would be repeated. On the basis of the test prescribed by Buckley LJ, the court found that, in this case, there was no doubt that the delayed deliveries were used to apply pressure on the plaintiff to pay higher prices and accordingly it was decided that Sigma was guilty of repudiatory conduct.

Retention sums

6.19 A retention sum or "retention money" is an amount held over by a building owner from progress payments to contractors for the purpose of accumulating into a sum which is available to meet any subsequent claims the owner may have against the contractor. Recourse to the retention sum is available to the owner, for example, if the contractor fails to rectify defects. The terms of the contract will also typically stipulate the conditions under which the retention sum will be released to the contractor at the end of the maintenance period.

6.20 In *Leun Wah Electric Co (Pte) Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 227, a subcontractor assigned to its supplier of goods its rights to the retention moneys kept by the main contractor in lieu of making interim payments to the supplier. This case was complicated by the challenge made

by the subcontractor's liquidator that the assignment was invalid. Three of the challenges are of particular interest to the construction industry, namely:

(a) whether consideration was given to satisfy s 98(3)(*a*) of the Bankruptcy Act (Cap 20, 2000 Rev Ed);

(b) whether the consideration given was considered at an undervalue as prescribed by s 98(3)(*c*) of the Bankruptcy Act; and

(c) whether the assignment was considered as giving unfair preference to the supplier by the subcontractor now under liquidation as prohibited by s 99 of the Bankruptcy Act.

6.21 Choo Han Teck J held (at [5]) that:

> [The retention money] was assigned in lieu of direct cash payment and that, in my view, was good consideration. It need not be adequate, so long as it was different.

He further held (at [7]) that the liquidators had not discharged their burden of proving that the transaction was undervalued. On the last issue, the learned judge had to determine whether there was an unfair preference given by the subcontractor to the supplier as against all the other creditors of the subcontractor. On the law, he considered that the issue turned on whether there was a desire to give an unfair preference. As he elaborated at [11]:

> The requirement in law that the assignor must have been influenced by a *desire* to give an unfair preference is an important one, because without that requirement, almost every payment to a creditor during the critical six months preceding a winding-up petition would, *ipso facto*, give rise to preference in favour of those creditors. [emphasis in original]

6.22 The learned judge found (at [11]) that the plaintiff dealt with the defendant's claim for payment in the way it did "as the best option in the circumstances" because, in the circumstances, "the assignment would forestall drastic action by the defendant, and thereby gain time for the plaintiff to collect its own debts". Accordingly, the liquidator's claim was dismissed.

Arbitration: Time at large and reasonable time

6.23 The subject of time being rendered "at large" was considered in relation to an arbitral award in *Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd* [2007] 1 SLR 32. The court noted that where an application

for extension of time evolved into a finding that time was at large, and a new completion date could not be determined by adding the quantum of extension of time to the latest extended completion date, the parties must be prepared to prove what might be the length of time (called "reasonable time" in common law parlance) that was required to complete the works.

Professional negligence in construction cases

6.24 In recent years, it is rare for professional negligence cases in the construction industry to be brought to court. The reason is that in a great majority of situations, insurance companies providing professional indemnity insurance prefer to settle the matter away from the glare of any publicity. Thus it appears as some surprise that, during the year under review, two cases on this area of law should surface in court.

6.25 In *Spandeck Engineering Pte Ltd v Defence Science & Technology* Agency [2007] 1 SLR 720, the plaintiff was appointed by the Government to work on a redevelopment project under the terms of the Public Sector Standard Conditions of Contract. The defendant was appointed the Superintending Officer ("SO") of the project. During the course of the works, the plaintiff experienced cash flow problems because it had under-priced the contract. The defendant agreed subsequently to adjust the terms of the contract to ensure that adequate money was allocated for the works. However, the problems persisted and ultimately, the plaintiff did not complete the works and the contract had to be novated to another contractor. In its action before the court, the plaintiff alleged that the defendant was negligent in its administration of the contract. It was argued by the plaintiff that it depended on the defendant to perform its duties as an independent certifier and these include the accurate certification of the works for payment purposes. Its case was that the defendant's failure to discharge this duty had led the plaintiff to suffer damage and loss – which were ascertained to be purely economic – and expense.

6.26 Lai Siu Chiu J held that, on the facts, the economic loss allegedly sustained by the plaintiff was not foreseeable by a person in the position of the defendant. The plaintiff had to look to the project employer to seek redress under the contract if it suffered any economic loss (at [77]). She further ruled that there was no duty of care owed by the defendant to the plaintiff as the main contractor of the project. Although there was physical proximity between the plaintiff and the defendant in the sense that they would often be present at the project site, there was no causal proximity as there was no assumption of direct responsibility by the defendant to the

plaintiff. The defendant was employed by the employer. If the defendant owed anyone a duty, it was to the employer. The test of proximity was not satisfied because the important element of foreseeability was absent and this element formed a part of the concept of "proximity" in the two-stage test formulated in *Anns v Merton London Borough Council* [1978] AC 728 (at [74], [79] and [87]). The learned judge considered that, at any rate, there were also policy reasons why a duty of care should not be imposed in this case. She observed (at [88]) that notwithstanding the fact that the amount which the plaintiff sought to recover was determinate, the class of persons liable to be sued by the main contractor was indeterminate:

> To find a duty of care between the SO and the main contractor in this scenario would be to open the floodgates not only to claims against other categories of third parties who are not privy to the contract between the employer and the main contractor (*eg* the SO's representative, the alternate SO's representative and the consultants employed to assist the SO's representative), but also to claims in non-residential property cases not related specifically to management corporations.

The decision thus affirmed that liability for economic loss in respect of the negligence of professionals is to be confined to the *Ocean Front* and *Eastern Lagoon* category of situations: see *RSP Architects, Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 ("*Ocean Front*") and *RSP Architects, Planners & Engineers v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449 ("*Eastern Lagoon*").

6.27 In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853, the plaintiff had employed a main contractor under a design-and-build contract for the design and construction of a factory. The contract incorporated the terms and conditions of the April 1995 edition of the Public Sector Standard Conditions of Contract, published by the Building and Construction Authority. The main contractor then engaged the defendant as the architect and qualified person for the project. Under the terms of the design-and-build contract, the defendant had no legal relationship with the plaintiff. Subsequently the defendant entered into a *separate deed of indemnity* with the plaintiff. The main contractor did not perform up to expectations pursuant to the design-and-build contract it had with the plaintiff. The works suffered from delays and defects. The main contractor went into liquidation and the plaintiff proceeded against the defendant architect. The claim was advanced, firstly, in contract on the basis of a deed of indemnity entered into by the parties and, secondly, in tort for pure economic loss. The defendant's case was that his duties were limited to those owed as a qualified person for the purposes of s 9 of the Building Control Act

(Cap 29, 1999 Rev Ed) and such legal duties as might flow from his legal relationship with the main contractor.

6.28 Andrew Phang J (as he then was) decided that, in the circumstances, the defendant architect owed the plaintiff a duty in tort to exercise reasonable care in the supervision of the project work carried out by the main contractor under the design-and-build contract. Such a legal duty extended beyond the contractual completion date. However, the learned judge also ruled that this duty should be subject to a "cut-off date". This would be the date when the main contractor had either practically or finally completed its work on the project itself (at [132]). This is a significant ruling because it is the first time that the court has decided in definite terms that a design professional employed by a contractor owes a duty of care to the employer under a design-and-build contract and that this duty is owed until the completion of the works.

6.29 The learned judge then distinguished between the rules of remoteness of damage under contract which, in Singapore, continue to be governed by the two-limb principle first laid down in *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145 and the rules of remoteness as applied to tort which centre on the principle of reasonable foreseeability as laid down in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 (at [135] and [137]). He held that where, as in this case, there were concurrent liabilities in both contract and tort, then given that the rules on remoteness of damage were stricter in the contractual sphere as opposed to the tortious sphere, a successful claimant "ought not to be better off in tort than it would be in contract" (at [140]). Accordingly, where there is concurrent liability in both contract and tort, the stricter rules and principles of remoteness in contract ought to prevail. The importance of this ruling lies in the hitherto assumption that where a claimant sues alternatively in tort and contract and is successful, he can elect whether to claim damages in tort or contract depending on whichever is more favourable to him.